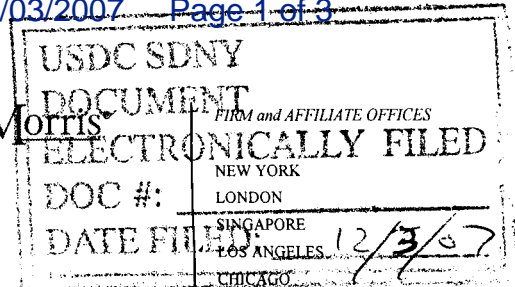


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November 21, 2007

**MEMO ENDORSED**

**BY HAND DELIVERY**

Honorable Judge William H. Pauly III  
 United States District Court  
 Southern District of New York  
 500 Pearl Street, Room 2210  
 Courtroom 11D  
 New York, NY 10007

**Re:** Capitol Records, Inc. et al. v. MP3tunes LLC and Michael Robertson  
Case No. 07 CIV 9931

Dear Judge Pauly:

We represent defendants, MP3tunes LLC and Michael Robertson (collectively "MP3tunes"), who contest personal jurisdiction in the above-referenced matter and who specially appear to request an extension of time to file a Motion to Dismiss. The time to answer the complaint or otherwise move is currently set for December 3, 2007. We ask the Court to grant an extension of time to MP3tunes to file its motion until an Order has issued on the Motion to Dismiss currently pending in a parallel action in the Southern District of California. Defendants have not made any prior request for an extension in this case.

Currently there are two lawsuits pending directed to the same transactions or occurrences, namely the services offered on MP3tunes' websites, www.mp3tunes.com and www.sideload.com.

1. Southern District of California Suit: MP3tunes LLC filed a declaratory relief action in the U.S. District Court, Southern District of California on September 20, 2007 seeking relief associated with disputes over the validity of EMI's take down notice and alleged copyright infringement involving the mp3tunes.com and sideload.com websites. MP3tunes received a take down notice from "EMI Music Group North America"<sup>1</sup> claiming to hold the copyright

<sup>1</sup> MP3tunes was unable to find any record of an EMI Music Group North America. However, there is an EMI Music North America, EMI Group North America and an EMI Group Holdings North America. EMI Group is the ultimate

Duane Morris

Honorable Judge William H. Pauly III  
November 21, 2007  
Page 2

for sound recordings listed in an attached spreadsheet. We understand from the take down notice that EMI Music Group North America owns the following record labels: Capitol Records, Priority Records, Blue Note, EMI, Virgin and Astralwerks, some of which are named plaintiffs in the instant action.

2. Southern District of New York Suit: EMI eventually filed the above-referenced action on November 9, 2007, listing the individual record labels and publishing companies as plaintiffs, including the enumerated labels owned by EMI Music North America. The instant action relates to alleged copyright infringement and unfair competition involving the mp3tunes.com and sideload.com websites.

Under the “first-to-file” rule, a case is heard in the venue where the matter is filed first. In this case, the first-to-file rule requires this case to be heard in the Southern District of California. In re Warrick, 70 F.3d 736, 740 (2d Cir. 1995); see also 28 U.S.C. § 1404(a).

EMI has filed a Motion to Dismiss the Southern District of California action requesting the court make an exception to the “first-to-file” rule based on alleged equitable considerations. The hearing on this Motion to Dismiss is scheduled for December 17, 2007. EMI does not contest jurisdiction or venue in the Southern District of California, but instead seeks a change of venue for the convenience of the parties under 28 U.S.C. § 1404(a).

An answer or other responsive pleading is due in the instant action on December 3, 2007. MP3tunes LLC and Michael Robertson anticipate filing a Motion to Dismiss the instant action in its entirety on several grounds, including the first-to-file rule, lack of personal jurisdiction and improper venue.

Thus, there will be two Motions to Dismiss pending at the same time, in two different judicial districts, each addressing whether to retain jurisdiction under the first-to-file rule. This inefficient use of judicial resources may lead to inconsistent results. Moreover, the ruling in the Southern District of California may make the first-to-file issue moot before this court if the Southern District of California court declines jurisdiction.

MP3tunes has requested that the parties stipulate to an extension of time to file a responsive pleading to allow the Southern District of California to rule on whether it will retain jurisdiction under the first-to-file rule. EMI’s counsel has indicated that EMI would not agree to the proposed extension absent defendants agreeing to participate in discovery in this action. Given that defendants are specially appearing only to request an extension of time, defendants

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parent for all Defendants in the Southern District of California action and all plaintiffs in the Southern District of New York action.

Duane Morris

Honorable Judge William H. Pauly III  
November 21, 2007  
Page 3

cannot agree to participate in discovery because doing so could prejudice defendants' ability to contest personal jurisdiction.

In the interest of judicial efficiency and without waiving the right to contest personal jurisdiction, MP3tunes LLC and Michael Robertson request that this Court enter the proposed Order enclosed herewith and extend the deadline to file a responsive pleading in the instant matter until the Southern District of California has ruled on the pending Motion to Dismiss. Because this ruling is likely to issue immediately prior to the Christmas and New Years holidays, we request the deadline to answer or otherwise respond to the complaint in the action pending before this Court be extended through and until January 8, 2007.

EMI will not be prejudiced by this extension as a Motion to Dismiss is unlikely to be heard by this Court until after the holidays. In fact, EMI will benefit from the extension in that it will not expend resources to brief issues that may be made moot by the Southern District of California court ruling.

Very truly yours,



Gregory P. Gulia

GPG/slj  
Enclosure

cc: Andrew H. Bart, Esq. (attorney for Plaintiffs) (by hand delivery)

*Application granted.*  
**SO ORDERED:**

  
**WILLIAM H. PAULEY III U.S.D.J.**

*11/30/07*

*The parties are directed to appear for a conference on December 4, 2007 at 11:00 a.m. The Court will resolve the matter at the conference. The time to respond to the pleading will be decided at the conference.*